No. _____

In the Supreme Court of the United States

SUN LIFE AND HEALTH INSURANCE COMPANY,
Petitioner,

v.

DAVID HANNINGTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Conkright v. Frommert*, 559 U.S. 506 (2010), this Court held that when an ERISA plan fiduciary is vested with discretionary authority, the arbitrary and capricious standard of review will apply and its interpretations "will not be disturbed if reasonable." The question presented here, on which there is an acknowledged conflict among eight circuits, is whether there can be an exception to the deferential arbitrary and capricious standard of review not previously recognized by this Court when the fiduciary interprets plan terms which refer to outside materials.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner here, and defendant/appellant below, is Sun Life and Health Insurance Company. Respondent here and plaintiff/appellee below is David Hannington. The United States participated as amicus in the court below.

CORPORATE DISCLOSURE STATEMENT

Sun Life and Health Insurance Company is a subsidiary of Sun Life Financial, Inc.

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The opinion of the court of appeals is reported at 711 F.3d 226 (App. 1-22). The district court's judgment is unreported (*id*. at 25).

JURISDICTION

The decision of the court of appeals was entered on March 29, 2013 (App. 1) and the petition for rehearing and rehearing en banc was denied by the court below on April 23, 2013 (*id*. at 49). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1132(a)(1)(B) which provides in relevant part that: "A civil action may be brought … by a participant or beneficiary … to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

STATEMENT

1. Deference to the interpretations of a fiduciary vested with discretionary authority is one of the hallmarks of ERISA. A court's deference to a plan's interpretations encourages employers to offer benefit plans to their employees by reducing plan costs as well as assuring the predictability and uniformity of a plan's

liability.[1] Without these benefits of deferential review, employers might reduce the benefits they offer or completely eliminate their programs.[2]

At issue in this litigation is the court of appeal's decision to review *de novo* the fiduciary's interpretation of a plan provision notwithstanding the delegation of discretionary authority. App., 8. Sun Life is a fiduciary of an ERISA-governed employee welfare benefit plan that provides long term disability benefits to eligible participants like Mr. Hannington. *id*. at 3. The plan pays a monthly benefit based on a participant's pre-disability earnings. *id*. The gross monthly benefit is then reduced to account for "other income" that a participant receives from specifically identified sources as well as "similar" sources of income. *id*. The issue in this case surrounds Sun Life's interpretation that income Mr. Hannington is receiving from an outside source is "similar" to sources of income specifically identified in the plan, and thus qualifies as "other income." *id*. at 3-4.

2. Mr. Hannington filed this lawsuit in the District of Maine under ERISA challenging Sun Life's interpretation of the plan. App., 1. The complaint sought a declaration that Sun Life is not entitled to take the reduction in benefits and also sought interest, attorney's fees and costs. The district court found in favor of Mr. Hannington while purporting to review the

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[1] *Conkright v. Frommert*, 559 U.S. 506, __, 130 S.Ct. 1640, 1650-51 (2010).

[2] *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987).

plan's interpretation under the arbitrary and capricious standard, but basing its decision entirely on a *de novo* decision from another court that it found "persuasive." *id*. at 5-7.

3. Following oral argument in the court of appeals, the First Circuit invited the Government to submit a brief on "whether the Veterans' Benefits Act reasonably could be characterized as similar to the Social Security Act or the Railroad Retirement Act such that benefits under the Veterans' Benefits Act could be deemed equivalent to those provided under the other two acts." App., 51-54. In its response to the request from the court below, the Government stated that "we do not take a position as to the correct outcome in this case when that [deferential] standard is applied …." *id*. at 70.

Following receipt of the Government's brief, the First Circuit issued its ruling affirming the decision of the district court, but basing its decision on a *de novo* review of the plan's interpretation. *id*. at 11, 18. According to the court of appeals, the question of whether the various sources of income were "similar" as required under the plan involved "the review of the extra-plan material [which] is de novo." *id*. at 8. Based on its *de novo* review, and focusing on the differences between the two sources of income instead of the similarities as required under the plan, the court of appeals concluded that the benefits Mr. Hannington is receiving for the same disability for which Sun Life is paying benefits is not "other income" subject to reduction. *id*. at 12-17.

REASONS FOR GRANTING THE WRIT

The question presented here is one of exceptional importance, involving the deference owed to the interpretations of a fiduciary under an ERISA benefit plan. Since the issue was first presented in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), this Court has held that an ERISA fiduciary with discretionary authority to interpret the terms of a plan is entitled to deference. Equally important, this Court has refused to recognize any exceptions to deferential review. For example, in *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008), this Court held that "when the terms of a plan grant discretionary authority to the plan administrator, a deferential standard of review remains appropriate even in the face of a conflict." Later, the Court rejected the argument that a plan's prior mistake can strip the fiduciary of deference in connection with its subsequent interpretation of the same provision. *Conkright*, 559 U.S. at __, 130 S.Ct. at 1649.

The First Circuit's decision further enlarges a circuit split on whether an interpretation which involves the consideration of outside materials creates an exception to discretionary review. In deciding this issue, the court of appeals broke away from prior precedent from this Court which refused to find any such exceptions. The lower court decision also undermines the goals and objectives of ERISA, including "protect[ing] the statute's interests in efficiency, predictability, and uniformity." *Id*. Therefore, further review by this Court is warranted.

A. There Is A Circuit Conflict On The Question Presented

Eight of the thirteen circuits have addressed the ERISA standard of review that applies to a court's review of a plan's interpretation when it involves the consideration of outside materials. Contrary to the decision reached by the First Circuit in this case, four of the circuits have concluded that a plan's interpretation is always reviewed under the arbitrary and capricious standard.

1. Four Circuits have held that review of an administrator's interpretation is deferential.

Third Circuit. The First Circuit's rationale in this case was rejected by the Third Circuit in *Fleisher v. Standard Ins. Co.*, 670 F.3d 116 (3d Cir. 2012). *Fleisher* involved the same issue presented in this case - whether the defendant is permitted to reduce its monthly benefit by the amount of disability benefits the claimant receives from another source. *Id*. at 119. The plaintiff argued that the plan's decision was not entitled to deferential review because it involved the interpretation of a "non-plan document." *Fleisher*, 670 F.3d at 121. The Third Circuit disagreed and reviewed the plan's interpretation with deference. In concluding that deferential review applied, the Third Circuit adopted the reasoning of the district court, which concluded that discretionary authority over "application of the Policy … includes the authority to 'interpret the plan and make findings of facts necessary to determine eligibility.'" *Id*. at 122.

Fourth Circuit. The Fourth Circuit's decision in *Carden v. Aetna Life Ins. Co.,* 559 F.3d 256, 258-59 (4th Cir. 2009), also involved the consideration of outside material in the context of interpreting a plan. In *Carden*, the Fourth Circuit reviewed the administrator's interpretation of the "other income benefits" section of the plan as permitting the offset for worker's compensation benefits the claimant received. Citing to the then-recent decision in *MetLife v. Glenn*, the Fourth Circuit stated that this Court's decision in that case required review of the administrator's decision for abuse of discretion. *Carden*, 559 F.3d at 260.[3]

Fifth Circuit. In the Fifth Circuit's decision in *High v. E-Systems, Inc.*, 459 F.3d 573, 579 (5th Cir. 2006), the court addressed whether the same government disability benefit at issue in this case qualifies as "other income." Based on the grant of discretion, the Fifth Circuit reviewed the plan's interpretation for abuse of discretion and upheld the administrator's conclusion that the offset applies. *High*, 459 F.3d at 579. In affirming the plan's decision, the court stated that because the defendant had discretion to interpret the plan, it was empowered to

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[3] The court of appeals in this case cited to a different Fourth Circuit decision, *Johannssen v. Dist. No. 1--Pac. Coast Dist., MEBA Pens. Plan*, 292 F.3d 159, 169 (4th Cir. 2002), as supporting *de novo* review. In *Johannssen* the court refused to give deference because it was "skeptical" that the plan's action "was one of plan interpretation. There is little or no evidence that Hart made any undertaking to interpret the terms of the Plan documents at all." *Id*. Instead, the issue concerned the identity of the legal successor as plan sponsor.

resolve any ambiguity by "exercising interpretive discretion." *Id*. (internal citation omitted).

Seventh Circuit. The Seventh Circuit applied deferential review to an ERISA plan's interpretation in *Frye v. Thompson Steel Co., Inc.*, 657 F.3d 488, 491 (7th Cir. 2011). There, the plan language stated that pension benefits were reduced by "[a]ny amount paid to or on behalf of any Employee or Pensioner . . . for which the Company is liable pursuant to Workers' Compensation …." *Frye*, 657 F.3d at 491. Even though the plan provision referenced a statute, like in this case, the Seventh Circuit concluded that it "must review the Committee's determination deferentially, asking only whether the … decision was arbitrary and capricious." *Frye*, 657 F.3d at 492 (internal quotations and citations omitted).

2. Four Circuits have applied *de novo* review.

First Circuit. In its decision in this case, the First Circuit held that "when the plan fiduciary is required, in the course of determining the meaning of the plan language, to interpret material outside the plan, our review of the extra-plan material is de novo." App., 8. In support of its use of *de novo* review in this case, the First Circuit also cited to its prior decision in *Coffin v. Bowater Inc*., 501 F.3d 80 (1st Cir. 2007). *id.* at 8-9. *Coffin* was reviewed by the court *de novo* because the case did not involve a question of plan interpretation whereas this case most certainly does so. At issue in *Coffin* was whether the administrator was allowed to terminate the benefit plan under the terms a stock purchase agreement, not the plan document itself. *Coffin*, 501 F.3d at 85. Because the stock purchase

agreement was not a plan document, the discretion given to the defendant to interpret the terms of the plan did not apply to its decision based on the stock purchase agreement and *de novo* review was appropriate.

Second Circuit. *De novo* review was applied by the Second Circuit in *Weil v. Retirement Plan Admin. Comm. of Terson Co., Inc.*, 913 F.2d 1045, 1048-49 (2d Cir. 1990), *vacated on other grounds by* 933 F.2d 106 (2d Cir. 1991), a decision relied on by the First Circuit in this case in support of its *de novo* review. App., at 10. The plan in *Weil* defined "partial termination" as being "within the meaning of Section 411 of the Internal Revenue Code." *Weil*, 913 F.2d at 1049. Based on the plan's internal reference to the statute, the Second Circuit concluded that the interpretation involved a question of law rather than one of plan interpretation which required *de novo* review. *Id.* The plan language in this case is different. It asks whether different acts that provide income to a claimant are "similar," (*id*. at 3) a question that is not answered by any statute but instead involves an interpretation of the plan itself.

Sixth Circuit. The lower court also cited to the Sixth Circuit decision in *Daft v. Advest, Inc*., 658 F.3d 583 (6th Cir. 2011), as supporting *de novo* review of the plan's interpretation. App., at 9. *Daft* held that "th[e] deferential standard does not apply to a plan administrator's determination of questions of law, such as whether a plan meets the statutory definition of a top-hat plan." *Id*. at 594. As noted, Sun Life's decision in this case did not involve the interpretation of a statute as in *Daft* or *Weil*.

Eighth Circuit. It was the Eighth Circuit's decision in *Riley v. Sun Life & Health Ins. Co*., 657 F.3d 739 (8th Cir. 2011), *cert. denied*, 132 S.Ct. 1870 (2012)[4], that the First Circuit heavily relied on in this case not only for its use of *de novo* review but also for its ultimate conclusion that the plan's interpretation was wrong. App., at 10, 15. The majority panel in *Riley* held that *de novo* review applied simply because the plan language referenced a statute.

There is a strong dissent in *Riley* in which the judge stated that the panel majority's decision to apply *de novo* review is contrary to the decision of this Court in *Conkright*. *Id*. at 744. The dissent further stated correctly that "[t]he issue is whether the relevant acts, properly understood, are 'similar' within the meaning of the Plan" which is an issue of plan interpretation for which deference must be given to the administrator. *Id*. at 745.

B. The Question Presented Is Important

The majority of Americans currently obtain private health insurance through ERISA-governed welfare plans. Peter K. Stris & Victor A. O'Connell, *Enforcing ERISA*, 56 S.D. L. Rev. 515, 516 (2011). As recently as 2010, approximately fifty-five percent of citizens in the United States were enrolled in employer-sponsored benefit plans. Anna Crane, *Lost in Translation: The*

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[4] Since the writ was denied by this Court in *Riley*, the split in the circuits on this subject further deepened with the First Circuit deciding in favor of *de novo* review in this case and the Third Circuit rejecting the same arguments in *Fleisher*.

Affordable Care Act's Attempt to Make Insurance-Speak Understandable, 81 Geo. Wash. L. Rev. 556, 562 (2013). Employer-sponsored benefit plans often provide insurance for employees at a lower cost based on the larger risk pool of insured lives. 81 Geo. Wash. L. Rev. at 563

The ERISA statute, which governs most benefit plans, reflects a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004) (quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987)). In addition to having discretion in creating benefit plans, employers are also generally free to modify or terminate those plans. *Curtiss-Wright Corp*. v. *Schoonejongen*, 514 U.S. 73, 78 (1995). Therefore, Congress sought "to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

Recognizing the importance of employer-sponsored benefit programs, Congress sought to "induce employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct …" *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002). Deference to fiduciaries with discretionary authority is a significant means of promoting the goals of ERISA, especially the predictability of results. In *Conkright,* this Court recognized that deference "promotes predictability, as an employer can rely on the expertise of the plan administrator rather than worry about unexpected and

inaccurate plan interpretations that might result from *de novo* judicial review." *Conkright*, 559 U.S. at __, 130 S.Ct. at 1649. This Court further recognized the "uniformity problems that arise from creating ad hoc exceptions to *Firestone* deference." *Id*. at __, 130 S.Ct. at 1650.

The importance of the court of appeal's decision in this case is not limited to the manner in which benefits are calculated, which is an important issue in its own right since it impacts the financial integrity of benefit plans. The First Circuit broadly stated that whenever an administrator considers "extra-plan material" while deciding the meaning of plan language, the *de novo* standard of review will apply. App., at 8. This exception to deferential review finds no support in the decisions of this Court. To the contrary, in *Metropolitan Life Insurance Co. v. Glenn*, 544 U.S. 105, 115-16 (2008), the Court refused to create "special procedural or evidentiary rules" regarding deference.

The broad exception to deferential review applied by the First Circuit can only result in "a patchwork of different interpretations of a plan, like the one here, … a result that 'would introduce considerable inefficiencies in benefit program operation, ...'" *Conkright*, 559 U.S. at __, 130 S.Ct. at 1640 (quoting *Fort Halifax*, 482 U.S. at 11). In fact, it already has done so. If this lawsuit was filed in the Third, Fourth, Fifth or Seventh Circuits, Sun Life's interpretation would have been reviewed under the arbitrary and capricious standard and likely would have been upheld based on similar decisions in those circuits. The lower court's refusal to apply deferential review allowed it to substitute its own judgment for that of the designated

fiduciary. As a result, plans are susceptible to inconsistent results which are dependent not on the underlying facts or the language in the plan, but where the lawsuit is filed. This concern over uniformity was raised in *Conkright*, where this Court refused to "creat[e] ad hoc exceptions to *Firestone* deference." 559 U.S. at __, 130 S. Ct. at 1650.

There is no legal basis for the First Circuit's exception to arbitrary and capricious review where the issue in this case was undoubtedly one of plan interpretation, even though that interpretation involved the consideration of additional material. This is no different than a plan's eligibility determinations which nearly always involve the consideration of outside materials in order to reach a decision. Notwithstanding a plan's review of outside materials, a plan's eligibility decision is always reviewed under the arbitrary and capricious standard when granted with discretion. *See e.g.*, *Glenn*, 554 U.S. 105 (holding that the arbitrary and capricious standard of review applied while referring to medical and vocational evidence considered by the plan in reaching its decision on eligibility).

In *Firestone*, this Court stated that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone*, 489 U.S. at 115. In reaching this conclusion, no distinction was made between a court's review of a plan's eligibility determinations and its interpretations. Nor is there any reason to distinguish between the two when it

comes to the standard of review to be applied by a court. *De novo* review by a court under these circumstances will only frustrate the goals of ERISA as explained above.

The decision of Sun Life in this case involved the interpretation of the plan itself. Specifically, Sun Life interpreted whether disability benefits the claimant is receiving from another source for the same disability he is receiving benefits under the plan fell under the plan's definition of "other income." App., at 3. The lower court incorrectly decided that the plan's consideration of "outside material" in reaching its interpretation voided the grant of discretion. The decision of the First Circuit is not supported by any decision of this Court or by the goals of ERISA. On the contrary, it is at odds with ERISA's recognized goals of uniformity and predictability. Therefore, review by this Court is necessary and this case presents the ideal vehicle for this Court to address this important issue.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant its Petition for a Writ of Certiorari on the question presented.

Respectfully Submitted,

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APPENDIX

APPENDIX

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 12-1085

[Filed March 29, 2013]

DAVID HANNINGTON,	)
	)
Plaintiff, Appellee,	)
	)
v.	)
	)
SUN LIFE AND HEALTH INSURANCE COMPANY,	)
	)
Defendant, Appellant.	)
	)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. Nancy Torresen, U.S. District Judge]

App. 2

Before

Howard, Ripple,[*] and Lipez, Circuit Judges.

Joshua Bachrach, with whom Wilson, Elser, Moskowitz, Edelman & Dicker LLP, Byrne Joseph Decker, and Pierce Atwood LLP were on brief, for appellant.

Gisele M. Nadeau for appellee.

March 29, 2013

RIPPLE, Circuit Judge. David Hannington filed this ERISA action against Sun Life and Health Insurance Company ("Sun") after Sun reduced his disability payments under an ERISA-qualified plan (the "Plan") because he also was receiving disability compensation under the Veterans' Benefits Act. The parties filed cross-motions for judgment on the record. After a hearing, the magistrate judge recommended that the district court grant Mr. Hannington's motion and deny Sun's. The district court approved the magistrate judge's recommended decision and entered

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[*] Of the Seventh Circuit, sitting by designation.

judgment for Mr. Hannington.[1] Sun timely appealed.[2] For the reasons set forth in this opinion, we affirm the judgment of the district court.

I

BACKGROUND

A.

Mr. Hannington participated, through his employer, in a group long-term disability plan issued by Sun, then known as GE Group Life Assurance Company ("GE"). Under the Plan, a disabled beneficiary receives sixty percent of his pre-disability salary. However, the Plan reduces this benefit by amounts received as "Other Income." This term is defined in the "Other Income" section of the Plan, which lists seven categories of income that will be deemed "Other Income" for purposes of reducing payments under the Plan. The fifth of these categories, the focus of the current dispute, defines "Other Income" to include "any amount of disability or retirement benefits under: a) the United States Social Security Act . . . ; b) the Railroad Retirement Act; c) any other similar act or law provided in any jurisdiction."[3] The Plan further

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[1] The district court's jurisdiction was predicated on 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e).

[2] The jurisdiction of this court is based on 28 U.S.C. § 1291.

[3] A.R. 103. These seven categories of "Other Income" are:
(1) temporary or permanent awards under various laws;
(2) disability benefits under any compulsory benefit act or law;

identifies GE, now replaced by Sun, as the claims fiduciary and grants it "the sole and exclusive discretion and power to . . . construe any and all issues relating to eligibility for benefits."[4] It further provides that "[a]ll findings, decisions, and/or determinations of any type made by the Claims Fiduciary shall not be disturbed unless the Claims Fiduciary has acted in an arbitrary and/or capricious manner."[5]

Mr. Hannington cannot work because he suffers from a blood disease that he contracted from the administration of vaccinations during his service in the United States Air Force. On account of this disability, he receives service-connected disability compensation ("VA benefits") under the Veterans' Benefits Act.

Sun approved Mr. Hannington's claim for benefits under the Plan. Upon learning that Mr. Hannington was receiving VA benefits, however, Sun determined that these VA benefits qualify as "Other Income" and so reduced the amount of Mr. Hannington's monthly plan benefit by the amount of his VA benefits.

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(3) disability or loss of income benefits under various insurance plans; (4) benefits received under an employer retirement plan; (5) the disputed section; (6) income received from any salary continuance plan; and (7) benefits under unemployment compensation laws. Id. To provide context, a copy of the "Other Income" section, denominated "Part 5" of the Plan, is appended to this opinion.

[4] Id. at 120.

[5] Id.

Consequently, Mr. Hannington filed an administrative appeal as required by the Plan. Sun denied the appeal.

B.

Mr. Hannington then initiated this action in the district court. When Sun submitted the administrative record to the district court, it also produced an affidavit from the associate director of its appeal unit that set forth the procedures implemented by Sun to fulfill its fiduciary duties under the Plan. It submitted that these procedures sufficiently neutralize its structural conflict of interest as both plan underwriter and fiduciary.

The district court referred the case to a magistrate judge for a recommended decision. In her recommendation, the magistrate judge first noted that, because the plan document gave Sun discretion to interpret and construe the Plan's language, the court's review was governed by the deferential arbitrary and capricious standard. The magistrate judge further noted, however, that the fact that Sun was construing policy language in favor of its own financial interest while laboring under a structural conflict of interest was not an irrelevant factor and that the court was entitled to take such a situation into consideration.

Turning to the merits of the dispute, the magistrate judge reviewed the similarities that Sun had pointed out between the Social Security Act and the Veterans'

Benefits Act[6] and compared the service-connected disability compensation that Mr. Hannington receives to Social Security disability benefits. She reviewed the respective statutes' definitions of "disability" and their purposes in awarding disability benefits.[7] Ultimately, the magistrate judge determined that those similarities were superficial and represented only a "few common threads [which] are woven into larger and distinctly different fabrics."[8] In her view, it was "the differences [between these Acts] that stand out upon comparison, not the similarities."[9]

She also emphasized Sun's structural conflict of interest, concluding that "[a] fiduciary free of a structural conflict of interest would not attempt to emphasize the limited similarities given the more substantial and meaningful differences that are readily

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[6] Before the magistrate judge, Sun provided no specific discussion of the Railroad Retirement Act. R.31 at 9 n.8. Sun identified the following similarities between the Veterans' Benefits Act and the Social Security Act: (1) they are federal laws, which provide disability benefits; (2) benefits are paid periodically; (3) death benefits are available; (4) the Acts contain anti-assignment clauses; (5) benefit claims are administered by independent agencies; and (6) a single application can be used to apply for both Social Security and VA benefits. R.21 at 6. Sun also argued that benefits under both are awarded without regard to fault and represent compensation for lost earning capacity. Id. The magistrate judge rejected these last two arguments as erroneous. R.31 at 9-10 nn. 9, 10.

[7] R.31 at 9-11.

[8] Id. at 10.

[9] Id.

apparent, particularly as the Plan Certificate makes no mention of VA benefits at all."[10] In the magistrate judge's view, "[a] reasonable fiduciary would be troubled by the [Plan's] omission of any reference to veterans' benefits or service-connected disability compensation."[11] The magistrate judge found persuasive the decision of the Eighth Circuit in Riley v. Sun Life & Health Insurance Co., 657 F.3d 739, 741 (8th Cir. 2011), cert. denied, 132 S. Ct. 1870 (2012), in which the court construed identical plan language under a de novo standard of review because the fiduciary's interpretation was "based on its construction of existing law." The Riley court concluded that VA benefits, awarded "for a wartime service-related disability, as a matter of statutory construction, do not derive from an act that is 'similar to' the SSA [Social Security Act] or the RRA [Railroad Retirement Act]." Id. at 742.

In due course, the district court concurred in the magistrate judge's analysis and entered judgment for Mr. Hannington. Sun then filed this timely appeal.

II

DISCUSSION

We review de novo the district court's grant of judgment on the record. Morales-Alejandro v. Med. Card Sys., Inc., 486 F.3d 693, 698 (1st Cir. 2007).

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[10] Id.

[11] Id. at 11.

Therefore, we must employ the same standard of review that the district court was required to employ on the issue for decision.

A.

The district court reviewed Sun's offset of Mr. Hannington's VA benefits under a deferential, arbitrary and capricious standard.[12] This deferential standard is appropriate when "the benefit plan gives the administrator or fiduciary[13] discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). Thus, when such discretion is vested in the plan fiduciary, as it is here, our standard of review for the fiduciary's interpretation of plan language is deferential. See Cusson v. Liberty Life Assurance Co., 592 F.3d 215, 230 (1st Cir. 2010). However, when the plan fiduciary is required, in the course of determining the meaning of the plan language, to interpret material outside the plan, our review of the extra-plan material is de novo.

For instance, in Coffin v. Bowater Inc., 501 F.3d 80 (1st Cir. 2007), we addressed an administrator's determination that its plan obligations to its subsidiary's workers terminated upon the subsidiary's sale. The plan at issue allowed the administrator "to modify, amend or terminate the plan at any time" and

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[12] See id. at 5.

[13] "Administrator," "claims fiduciary" and "plan fiduciary" are used interchangeably by the parties in this case. For consistency, we shall refer to Sun as the Plan's "fiduciary."

"afford[ed] the administrator substantial deference." Id. at 84, 85. The Coffin administrator argued that a stock purchase agreement executed in connection with the sale contained language sufficient to terminate its obligations and satisfy ERISA's procedural termination requirements. Id. at 84. Discussing the standard of review, we held that "[w]here the administrator's determination of eligibility depends upon an interpretation of non-plan documents (in this case, the [stock purchase agreement]), our review is . . . de novo." Id. at 85 (citing Firestone, 489 U.S. at 112). Thus, we reviewed de novo the administrator's interpretation of the stock purchase agreement and of ERISA (that the stock purchase agreement satisfied ERISA's requirements).

Our decision in Coffin is in accord with the decisions of the other circuits that have recognized that when a fiduciary's interpretation of the plan is based on a legal determination, review is de novo. See, e.g., Daft v. Advest, Inc., 658 F.3d 583, 594 (6th Cir. 2011) (noting that the deferential standard of review "does not apply to a plan administrator's determination of questions of law, such as whether a plan meets the statutory definition of a top-hat plan; a court reviews those questions de novo"); Riley, 657 F.3d at 741-42 (concluding in a case identical to the one before us in all significant respects that the de novo standard of review ought to apply because the court was required to review the administrator's "interpretation of a controlling principle of law"--the character and scope of benefits under the Veterans' Benefits Act (internal quotation marks omitted)); Johannssen v. Dist. No. 1--Pac. Coast Dist., MEBA Pens. Plan, 292 F.3d 159, 169 (4th Cir. 2002) ("Such legal questions are

appropriate terrain for the courts, not plan administrators, and when eligibility determinations turn on questions of law we have not hesitated to apply a de novo standard of review."), abrogated on other grounds by Metro. Life Ins. Co. v. Glenn, 554 U.S. 105 (2008); Weil v. Ret. Plan Admin. Comm. of Terson Co., 913 F.2d 1045, 1049 (2d Cir. 1990) (same), vacated on other grounds, 933 F.2d 106 (2d Cir. 1991); see also 2 Lee T. Polk, ERISA Practice & Litigation § 11:53 (2010).

In the particular dispute before us, Sun's interpretation of the "Other Income" section of the Plan depends wholly upon its interpretation of external, non-plan material: the Veterans' Benefits Act,[14] the

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[14] The only citation Sun provides to the Veterans' Benefits Act is 38 U.S.C. § 1110. See Appellant's Br. 16. Section 1110 is only the provision concerning basic entitlement to service-connected disability compensation. Like other courts to consider the issue, see, e.g., Riley v. Sun Life & Health Ins. Co., 657 F.3d 739, 740 (8th Cir. 2011), we believe that the Veterans' Benefits Act begins at 38 U.S.C. § 101 and encompasses all of Title 38 (Veterans' Benefits).

It is probably a misnomer to refer to Title 38 this way. See Gov't's Amicus Br. 5. Title 38 provides for all veterans' benefits but is not comprised of one act. In 1958, Congress passed Public Law 85-857, which was codified as Title 38, "[t]o consolidate into one Act all of the laws administered by the Veterans' Administration." Pub. L. No. 85-857, 72 Stat. 1105 (1958). This enactment codified provisions for both service-connected disability compensation and non-service-connected disability pensions. In subsequent years, Title 38 has been amended multiple times. However, since the parties use the term "Veterans' Benefits Act," we also refer to Title 38 in this way for ease of discussion.

Social Security Act[15] and the Railroad Retirement Act.[16] Under the Plan language, the character of, and especially the benefits available under, the comparator acts and the statute providing the benefits potentially available for off-set determine the scope of benefits available under the Plan. If the Veterans' Benefits Act is not similar to the Social Security Act and/or the Railroad Retirement Act, then Sun cannot offset Mr. Hannington's VA benefits. Therefore, because Sun's decision to offset Mr. Hannington's VA benefits was governed entirely by its interpretation of several statutes, the district court ought to have reviewed de novo Sun's determination that Mr. Hannington's VA benefits were "Other Income" under the Plan; this is the standard of review which we also must employ.

B.

We now turn to an examination of Sun's decision, as plan fiduciary, to set off Mr. Hannington's VA benefits against the amount owed him under the Plan.

On October 15, 2012, this court issued an order inviting the United States to file a brief as amicus curiae "presenting its view on whether the Veterans' Benefits Act reasonably could be characterized as similar to the Social Security Act or the Railroad Retirement Act such that benefits under the Veterans' Benefits Act could be deemed equivalent to those provided under the other two acts." Hannington v. Sun Life & Health Ins. Co., No. 12-1085, R.32 at 2 (Oct. 15, 2012). The court expresses its thanks to the United States for having accepted the invitation and for having provided a very helpful brief.

[15] 42 U.S.C. §§ 401 et seq.

[16] 45 U.S.C. §§ 231 et seq.

1.

Sun seeks reversal of the district court's decision prohibiting its offset of Mr. Hannington's service-connected disability compensation under the Veterans' Benefits Act against the long-term disability payments that it provides to him under the Plan. Sun bases its position on an interpretation of the Plan's "Other Income" section. In its view, under the fifth clause of this section, Mr. Hannington's VA service-connected disability compensation must be considered income from "a similar act or law." The fifth clause defines "Other Income" as follows:

> [a]ny amount of disability or retirement benefits under:
>
> a) the United States Social Security Act to which[:]
>
> i) you are entitled; and
>
> ii) your Dependents may be entitled because of your disability or retirement;
>
> b) the Railroad Retirement Act;
>
> c) any other similar act or law provided in any jurisdiction.[17]

Sun determined that the Veterans' Benefits Act is similar to the Social Security Act and/or the Railroad

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[17] A.R. 103.

Retirement Act based simply on its identification of some common characteristics of the statutes. Sun observes that all (1) are federal, (2) pay certain periodic disability benefits, (3) have anti-assignment clauses and (4) are administered by independent agencies. It also stresses the similarities between the Social Security Act and the Veterans' Benefits Act: Both pay benefits based on impairment of earning capacity, both ensure a minimum level of income and both can have identical qualifications because one way to qualify for VA benefits is to have been determined permanently disabled under the Social Security Act.

Importantly, Sun has never considered whether the VA service-connected disability compensation Mr. Hannington receives is similar to available disability benefits under the comparator acts. Sun's statutory interpretation ignored the context and the purpose of the comparison. When, as here, the object of the inquiry is to identify sources of income for purposes of set-off, a meaningful comparison of the Social Security Act and the Railroad Retirement Act to a potentially similar act or law requires a comparison of the benefits offered by the laws in question. The "Other Income" section has no interest in the administrative mechanics of various statutory schemes or of the statutory structure of the agency administering the disbursement. Its focus is simply the nature of the payments and the role that they play in the financial health of the recipient. The district court was therefore correct in characterizing Sun's focus on factors not

relevant to this inquiry as "superficial."[18] Sun's approach to the interpretation question was thus improper and, as we shall explain, its conclusion also was erroneous.

2.

Sun's inexplicable decision to omit from its comparison of the disability statutes any examination and comparison of the substantive features of the veterans' disability scheme caused it to misapprehend, seriously, the degree of dissimilarity between the Veterans' Benefits Act and the comparator acts. When the substantive features of the Veterans' Benefits Act are viewed as a whole, its dissimilarity in scope and purpose to the Social Security Act and the Railroad Retirement Act is evident.

The primary purpose of the Veterans' Benefits Act is to care for and to support those who have served our

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[18] R.31 at 10. Sun also cites the Texas Supreme Court's statement in Barnett v. Aetna Life Insurance Co., 723 S.W.2d 663, 666 (Tex. 1987), of the "similar features" of the Social Security Act and the Veterans' Benefits Act. Both "are (1) governmental or legislative plans providing for (2) periodic payment (3) to qualified individuals (4) who have suffered a physical disability (5) without regard to fault. In addition, all provide death benefits, have anti-assignment clauses, and are administered by independent agencies." Id. These similarities are superficial; as the Texas Supreme Court went on to note, "the similarity of features of the acts are not the key ingredient, rather it is the objectives for which they were created and the manner in which the acts are implemented." Id. at 666-67.

Country in the Armed Forces of the United States.[19] Its purpose is to, "in the words of Abraham Lincoln, 'provide[] for him who has borne the battle, and his widow and his orphan.'" Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 309 (1985). VA benefits therefore are linked not to employment but to past service in the Armed Forces. Notably, because of this fundamental difference in purpose and scope, "funding for SSA [Social Security Act] and RRA [Railroad Retirement Act] disability benefits derives from a tax on both the employee and employer" whereas Veterans' Benefits Act "benefits are funded by Congress through the VA's budget instead of by a tax on members of the military." Riley, 657 F.3d at 742, 743.

This purpose stands in stark contrast to the Social Security Act and the Railroad Retirement Act. The Social Security Act and the Railroad Retirement Act, like many of the other types of "Other Income" defined

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[19] Title 38 therefore includes not only disability compensation, but a host of other benefits for veterans. See, e.g., 38 U.S.C. §§ 1902 (life insurance policies), 3461 (entitlement to educational assistance), 3710 (loans to purchase or construct a primary residence). Therefore, as a threshold matter, the Veterans' Benefits Act's broad scope demonstrates the inaccuracy of Sun's view that its "primary purpose [is] providing the same types of benefits" as the Social Security Act and the Railroad Retirement Act. Appellant's Br. 16. The Social Security Act and Railroad Retirement Act do not provide life insurance, home or small business loans, educational benefits or any other benefits beyond those for disability and retirement; they certainly do not offer benefits specifically designed to assist beneficiaries with navigating most major facets of civilian life. See 38 U.S.C. §§ 3001-4335 (Part III. Readjustment and Related Benefits).

in the Plan, are insurance programs tied to the beneficiary's employment.[20] See generally Hisquierdo v. Hisquierdo, 439 U.S. 572, 573 (1979) (discussing the Railroad Retirement Act's purpose as "provid[ing] a system of retirement and disability benefits for persons who pursue careers in the railroad industry"); California Dep't of Human Res. Dev. v. Java, 402 U.S. 121, 130-32 (1971) (discussing the purposes and history of the Social Security Act).

Furthermore, when we focus only on benefits related to disability, the statutory scheme of the Veterans' Benefits Act provides for two different types of benefits: service-connected disability compensation (which Mr. Hannington receives) and disability pensions for veterans of wartime service or their surviving spouses or children.[21] The latter benefit arguably might bear some substantive similarity to the benefits obtainable under the Social Security Act and the Railroad Retirement Act, but we need not and do not decide that question today. The former, however--the service-connected disability compensation received by Mr. Hannington--is decidedly different, and it is the substantive nature of this benefit that must be compared to those under the comparator statutes. These VA benefits are based on diseases and injuries incurred by service personnel on account of their

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[20] "Other Income" includes: workers' compensation; benefits under an occupational disease law; a settlement with an employer in lieu of workers' compensation; benefits received under a plan related to or from the beneficiary's employer; unemployment compensation; and a salary continuance plan. A.R. 103.

[21] See 38 U.S.C. §§ 1521, 1541, 1542.

military service. They are calculated not on a particular veteran's actual disability but rather "represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations."[22] Because they are based on the special sacrifice of illness or injury in military service, they are payable in increments of disability ranging from ten percent to one hundred percent.[23] Notably, although Congress has forbidden duplication for some government benefits, it has not done so when there is an overlap between Social Security Act or Railroad Retirement Act benefits and VA benefits.[24]

There are very important substantive differences between the Veterans' Benefits Act and the Social Security Act and the Railroad Retirement Act, especially between the service-connected disability compensation received by Mr. Hannington and the available benefits under the comparator acts. These differences render the Veterans' Benefits Act, as a matter of statutory construction, dissimilar to the Social Security Act and the Railroad Retirement Act. Thus, the VA benefits Mr. Hannington receives are not "Other Income" for purposes of reducing the payment Sun owes Mr. Hannington under the Plan.

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[22] 38 C.F.R. § 4.1; see also 38 U.S.C. § 1155.

[23] See 38 U.S.C. §§ 1114, 1115.

[24] See 20 C.F.R. § 226.72(d) (Railroad Retirement benefits are not reduced by the receipt of VA benefits); id. § 404.408(b)(2)(ii) (Social Security benefits are not reduced by the receipt of VA benefits).

Conclusion

The judgment of the district court is affirmed.

AFFIRMED.

APPENDIX

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PART 5: OTHER INCOME

Other Income

Other Income means those benefits or amounts you receive or are eligible to receive as indicated below:

1. Any temporary or permanent award under:
   a) any Workers' Compensation Law;
   b) any Occupational Disease Law;
   c) any other simtlar act or law; or
   d) any settlement or damages which is made in lieu of Workers' Compensation benefits and is paid to you, or which you would be entitled to in the absence of recovery by your Employer or a Workers' Compensation insurer, but only to the extent that any such damages or settlement represent compensation for your loss of income.

2. Any disability benefits under any compulsory benefits act or law.

3. Any disability or loss of income benefits provided under:

a) any other group insurance plan including any disability benefits received under the terms of a group life insurance policy for permanent total disability.
b) any Retirement Plan.
c) any governmental retirement system as a result of your job with your Employer.
d) any basic automobile reparations insurance (no fault) coverage unless prohibited by state law.

4. Any benefits received under any Retirement Plan from your Employer, including Disability Retirement Benefits, except that only that portion that is not funded by employee contributions will be considered a Retirement Plan benefit.

5. Any amount of disability or retirement benefits under:
   a) the United States Social Security Act to which;
      i) you are entitled; and
      ii) your Dependants may be entitled because of your disabiity or retirement
   b) the Railroad Retirement Act;
   c) any other similar act or law provided in any jurisdiction.

6. Any income received from any formal or informal salary continuance plan. We will only consider as Other Income that amount which, when added to your Gross Monthly Benefit, exceeds 100% of your Basic Monthly Earnings. By Gross Monthly Benefit we mean the amount of your Monthly Benefit prior to any reductions by Other Income.

7. Any benefits under Unemployment Compensation Laws.

Right of Recovery

With respect to Other Income, without our consent you shall not enter into any agreement, settlement, or take any action which may prejudice our rights. You must execute and deliver to us documents we may require to protect our rights and do whatever else is required to help us secure our rights. Any amounts which you are entitled to recover from any agreement, settlement or action will be considered as Other Income.

AR103

United States Court of Appeals
For the First Circuit

No. 12-1085

[Filed March 29, 2013]

DAVID HANNINGTON,	)
	)
Plaintiff, Appellee,	)
	)
v.	)
	)
SUN LIFE AND HEALTH INSURANCE COMPANY,	)
	)
Defendant, Appellant.	)

JUDGMENT

Entered: March 29, 2013

This cause came on to be heard on appeal from the United States District Court for the District of Maine and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ Margaret Carter, Clerk

cc: Mr. Bachrach, Mr. Decker, Mr. Koppel, Ms. Nadeau & Mr. Singer.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 12-1085

[Filed April 18, 2013]

DAVID HANNINGTON,	)
	)
Plaintiff, Appellee,	)
	)
v.	)
	)
SUN LIFE AND HEALTH INSURANCE COMPANY,	)
	)
Defendant, Appellant.	)
	)

ERRATA SHEET

The opinion of this Court issued on March 29, 2013, is amended as follows:

On the coversheet below "Gisele M. Nadeau for Appellee." insert "John S. Koppel, with whom Michael Jay Singer, Stuart F. Delery, Principal Deputy Assistant Attorney General, U.S. Department of Justice, Will A. Gunn, General Counsel, Richard J. Hipolit, Assistant General Counsel, and Joshua P.

Mayer, Attorney, Department of Veterans Affairs, were on brief, for Amicus Curiae United States of America.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 1:10-cv-00431-NT

[Filed December 15, 2011]

DAVID HANNINGTON,	)
	)
Plaintiff,	)
	)
v.	)
	)
SUNLIFE AND HEALTH INSURANCE COMPANY,	)
	)
Defendantt.	)
	)

ORDER AFFIRMING THE RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

The United States Magistrate Judge filed with the Court on October 14, 2011 her Recommended Decision (Docket No. 31). The Defendant filed its Objections to the Recommended Decision (Docket No. 32) on October 28, 2012. Plaintiff filed his Response to the Defendant's objections (Docket No. 33) on November 14, 2011.

I have reviewed and considered the Magistrate Judge's Recommended Decision, together with the entire record; I have made a de novo determination of all matters adjudicated by the Magistrate Judge's Recommended Decision; and I concur with the recommendations of the United States Magistrate Judge for the reasons set forth in her Recommended Decision, and determine that no further proceeding is necessary.

1. It is therefore ORDERED that the Recommended Decision of the Magistrate Judge is hereby AFFIRMED.

2. It is further ORDERED that the Plaintiff's Motion for Judgment (Docket No. 18) is GRANTED.

3. It is further ORDERED that the Defendant's Motion for Judgment is DENIED.

4. It is further ORDERED that the Defendant pay past and future benefits to the Plaintiff without any offset for the Plaintiff's receipt of service-connected disability benefits.

SO ORDERED.

/s/ Nancy Torresen
NANCY TORRESEN
UNITED STATES DISTRICT JUDGE

Dated this 15th day of December, 2011

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CIVIL NO. 1:10-CV-00431-NT

[Filed December 15, 2011]

DAVID HANNINGTON,	)
	)
Plaintiff,	)
	)
v.	)
	)
SUNLIFE AND HEALTH INSURANCE COMPANY,	)
	)
Defendant.	)
	)

JUDGMENT

In accordance with the Order Affirming the Recommended Decision of the Magistrate Judge, entered by the Court on December 15, 2011;

Judgment is hereby entered for plaintiff David Hannington and against defendant Sun Life Health Insurance Company.

It is further ADJUDGED that the Defendant pay past and future benefits to the Plaintiff without any offset for the Plaintiff's receipt of service-connected disability benefits.

CHRISTA K. BERRY, CLERK

By: /s/Devon F. Richards
Devon F. Richards
Deputy Clerk

Dated: December 15, 2011

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

1:10-cv-00431-GZS

[Filed October 14, 2011]

DAVID HANNINGTON,	)
	)
Plaintiff,	)
	)
v.	)
	)
SUNLIFE AND HEALTH INSURANCE COMPANY,	)
	)
Defendantt.	)
	)

RECOMMENDED DECISION

David Hannington brought this action against Sun Life and Health Insurance Company pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), alleging that Sun Life's computation of his monthly benefit under James W.

Sewall Company's Long Term Disability Plan[1] depends upon an arbitrary and capricious reading of the Plan and must be overturned by this Court. The parties presently have before the Court cross-motions for judgment on the merits. The Court referred these motions for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). The parties presented oral argument on October 6, 2011. For reasons that follow, I recommend that the Court grant Hannington's motion for judgment and deny Sun Life's motion for judgment.

STATEMENT OF THE CASE

It is undisputed that Hannington is a qualifying beneficiary under the Long Term Disability (LTD) Plan in question and that the Plan is an employee benefit plan subject to ERISA. The dispute arises based on Sun Life's calculation of Hannington's monthly benefit.

Specifically, Sun Life has asserted a right to offset Hannington's service-connected disability benefits, which Hannington receives because his disability is connected with his military service. The relevant plan language and the undisputed background facts are as follows.

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[1] According to the documentation, the James W. Sewall Company is a participant in a group policy held by the Trustee of the Engineering & Architectural Service & Supply Industry Group Insurance Fund (Rhode Island) under a trust agreement dated September 1, 1977. (Admin. R. 90.) The certificate for this Plan identifies a Group Insurance Policy issued by GE Group Life Assurance Company. (Id.)

A. The Plan

The Group Policy Certificate is found in the administrative record at pages 90 through 118. The Certificate identifies GE Group Life Assurance Company as the issuer of the group insurance policy and makes no mention of Sun Life, although the application (claim) form in the Record is a Sun Life form. (Id. at 88.) The Certificate ends at page 118 of the record and a two-page ERISA notice form follows at pages 119 to 120. The notice form identifies GE Group Life Assurance Company as the claims fiduciary and represents that GE Group Life Assurance Company possesses "discretionary authority to make claim, eligibility and other administrative determinations regarding [the policy], and to interpret the meaning of [policy] terms and language." (Id. at 120.) The notice form further indicates:

> The Claims Fiduciary shall have the sole and exclusive discretion and power to grant and/or deny any and all claims for benefits, and construe any and all issues relating to eligibility for benefits. All findings, decisions, and/or determinations of any type made by the Claims Fiduciary shall not be disturbed unless the Claims Fiduciary has acted in an arbitrary and/or capricious manner.

(Id.) In its motion for judgment, Sun Life quotes the foregoing language and asserts that it has sole and exclusive discretion to determine Hannington's claim. At oral argument, Sun Life explained that it is a successor to GE Group Life Assurance Company, rather than a mere third-party claims administrator.

Hannington has not challenged the basic premise that Sun Life is the "claims fiduciary" cloaked with the discretionary authority contained in the ERISA notice form.

The basic measure of monthly LTD benefits under the Plan is 60 percent of the employee's pre-disability salary. However, pursuant to the Group Policy Certificate, a beneficiary's monthly benefit is to be reduced by "Other Income benefits, as defined in the OTHER INCOME part of the Certificate." (Admin. R. at 102.) The Other Income part lists seven categories of "benefits or amounts" received by an insured from other sources. Those seven categories are, essentially: (1) workers' compensation and occupational disease laws; (2) disability benefits under compulsory benefits acts; (3) disability or loss of income benefits under other insurance plans and policies, including retirement plans and government retirement programs; (4) employer-funded retirement plan benefits; (5) the category in dispute here (set out in full below); (6) income from a salary continuance plan; and (7) benefits under unemployment compensation laws. This case turns on the reach of the language set forth in category five, which defines as other income:

> 5. Any amount of disability or retirement benefits under:
>
> a) the United States Social Security Act . . .;
> b) the Railroad Retirement Act; [or]
> c) any other similar act or law provided in any jurisdiction.

(Id. at 103.)

B. Undisputed Background Facts

In a Rating Decision of November 26, 2008, the Department of Veterans Affairs concluded that Hannington suffers from a blood disease he contracted from vaccinations received in anticipation of deployment to Iraq. (Id. at 563.) The VA found that this disability is "service connected" and granted Hannington's claim for VA service-connected benefits "with an evaluation of 100 percent [disability] effective May 13, 2008." (Id. at 561.)

Hannington left work on June 19, 2008, based on the same disabling condition. Hannington applied for LTD benefits under the Plan on October 13, 2008. In his application, Hannington identified his disabling condition as the same disease for which he would later obtain his VA service-connected benefit. (Id. at 88-89.)

Sun Life notified Hannington on February 20, 2009, that it was approving his claim for LTD benefits. (Id. at 659.) The notification informed Hannington that he should apply for social security benefits if his disability was expected to persist for longer than one year and requested further information regarding Hannington's VA benefits. (Id. at 660.) Following its review of the VA Rating Decision, Sun Life concluded that Hannington's VA benefit was "other income" that must be offset against Hannington's LTD benefits effective September 17, 2008,[2] and demanded reimbursement for overpayment in the preceding seven months, calculated

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[2] September 17, 2008, is the commencement date for the LTD benefit. (Admin. R. at 663.)

as $16,701.97.[3] (Id. at 528.) Sun Life thereafter denied Hannington's administrative appeal. (Id. at 479.)

In connection with its submission of the administrative record, Sun Life filed the Affidavit of Kathleen A. Peters, Associate Director of Sun Life's Group LTD Appeal Unit. Ms. Peters avers, among other things, that Sun Life has a practice of evaluating "each claim fairly on its individual merits;" that it uses a "quality control process to ensure accurate decision-making"; that its employees do not have a financial incentive to deny claims; that employees are eligible to receive annual bonuses "based on the overall performance of Sun Life"; that senior consultants in the Appeal Unit make "independent *de novo* assessments" of claims denials; and that the persons making these decisions work in departments that are separate from "financial, actuarial and underwriting departments." (Doc. No. 10.)

C. Hannington's Plea for Relief

Hannington's complaint requests the following relief: "Plaintiff seeks recovery of the sum deducted from the benefits to which he is entitled under the Plan; a declaration that Sun Life cannot deduct the VA benefits from the Plan benefits to which he is entitled plus costs and attorney's fees." (Compl. at 2.) Additionally: "Plaintiff requests judgment against

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[3] The calculation asserts that Sun Life has a carry-forward credit of $799.82 in September 2008 and of $277.14 in October 2008, but it is not explained why Sun Life is carrying forward as "overpayment" amounts that Sun Life never paid to Hannington. (See Admin. R. at 531-32.)

Defendant for damages in an amount determined to be reasonable; equitable relief in the form of a Court Order that Plaintiff is entitled to the full amount of past and future benefits without deduction for VA, service-connected, disability benefits and all other remedies allowed and appropriate under ERISA plus interest, costs, attorney fees, and such further relief as the Court deems just and proper." (Id. at 5.)

STANDARD OF REVIEW

Under prevailing law, the Court's review of Sun Life's benefits determination is said to be *de novo*. Recupero v. New Eng. Tel. & Tel. Co., 118 F.3d 820, 826-27 (1st Cir. 1997). However, because the Plan grants discretionary authority to the claims fiduciary, Sun Life, this *de novo* review is subject to a deferential, "arbitrary and capricious" standard and the Court is prevented from exercising plenary power to make the benefits determination anew. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989); Matias-Correa v. Pfizer, 345 F.3d 7, 11 (1st Cir. 2003); Dandurand v. Unum Life Ins. Co. of Am., 284 F.3d 331, 335 (1st Cir. 2002); Recupero, 118 F.3d at 828. Thus, Sun Life's interpretation must be upheld unless Sun Life's interpretation is arbitrary and capricious.

The parties have not identified any disputed factual issues and, consequently, the sole issue is whether Sun Life has interpreted the language of its Plan in an arbitrary and capricious manner. In the context of ERISA fiduciary duties, an insurer's construction of its own policy language will be found arbitrary and capricious if the construction is unreasonable. Matias-Correa, 345 F.3d at 12. The rule of *contra proferentum*,

which ordinarily requires that ambiguous language in an insurance policy be construed against the interest of its author, is inapplicable in the ERISA context when the plan affords the decision-maker discretionary authority to construe plan language. D&H Therapy Assocs., LLC v. Boston Mut. Life Ins. Co., 640 F.3d 27, 35 (1st Cir. 2011); Recupero, 118 F.3d at 825. Nevertheless, the fact that the fiduciary is construing policy language in favor of its own financial interest is not an irrelevant factor. To the contrary, the presence of a conflict of interest is a factor that the Court must necessarily take into consideration. This factor generally proves less important "where the administrator has taken active steps to reduce potential bias and to promote accuracy." Cusson v. Liberty Life Assur. Co., 592 F.3d 215, 224 (1st Cir. 2010) (quoting Metro. Life Ins. Co. v. Glenn, 128 S. Ct. 2343, 2351 (2008)). In effect, the Court refrains from exercising *de novo* review or imposing special burden-of-proof rules or any special procedural or evidentiary rules, but considers as one factor that the administrator is laboring under a structural conflict of interest. Glenn, 128 S. Ct. at 2351.

DISCUSSION

Sun Life determined that Hannington's service-connected VA benefits qualify as "other income" that should be offset against his LTD benefits under the Plan. Sun Life maintains that the VA benefits are "other income" under the language of the Certificate because federal law providing for VA benefits, 38 U.S.C. §§ 1110 *et seq.*, is "similar" to the United States Social Security Act, which also provides disability

benefits to qualified applicants. (Def.'s Mot. for J. at 6-7, Doc. No. 17.)

For ease of reference, the relevant Certificate definition of other income is repeated here:

> 5. Any amount of disability or retirement benefits under:
> a) the United States Social Security Act . . .;
> b) the Railroad Retirement Act; [or]
> c) *any other similar act or law provided in any jurisdiction*.

(Admin. R. at 103 (emphasis added).)

Hannington argues that Sun Life's interpretation of this provision is arbitrary because VA benefits are dissimilar to social security disability benefits. Hannington maintains that his monthly VA benefits are not "income" because they are paid in compensation for a service-connected disability and are therefore not designed to replace prior income. (Pl.'s Mot. for J. at 4, Doc. No. 18.) Hannington also argues that VA service-connected benefits are different because they are tax-free[4] and are unrelated to a veteran's ability to engage in full-time employment. (Id. at 4-5, citing Admin. R. at 488.)[5]

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[4] See 26 U.S.C. § 104(a)(4).

[5] Sun Life objects to Hannington's citation of a response he received to an inquiry posted to the Department of Veterans Affairs, asserting that Hannington's attempt to treat this

Hannington's preliminary argument that his service-connected benefits are not "income" is not persuasive. Service-connected benefits are clearly "income." Nevertheless, that limited point does not undermine Hannington's cause. The issue for decision is whether these benefits can reasonably be regarded as "other income" under the fifth definition in the Certificate; that is, whether they are provided pursuant to an act or law that is similar to the Social Security Act or the Railroad Retirement Act. On that question, Hannington has persuaded me that federal service-connected disability compensation law is very much unlike the Social Security Act or the Railroad Retirement Act, such that it is unreasonable to lump it together with the latter acts based on vague language referencing "similar" acts or laws.

Service-connected benefits are made available pursuant to "wartime disability compensation" law, 38 U.S.C. §§ 1110-1118, or "peacetime" disability compensation law, id. §§ 1131-1137.[6] Both laws provide veterans with disability benefits for service-connected

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document as equivalent to a formal statement of VA policy is not appropriate. This is a fair objection, but Hannington's argument is not lost or diminished on the basis of an evidentiary ruling.

[6] Hannington contracted his disease from an immunization administered in 2002 in anticipation of deployment to Iraq. Because this particular deployment was not for the first conflict with Iraq (the Persian Gulf War), it is unclear whether his application is for "wartime" or "peacetime" disability compensation. See 38 C.F.R. § 3.2. Most likely his compensation falls under the peacetime provisions because Congress only "authorized" the use of military force in connection with the more recent engagement, without ever declaring war.

disability resulting from personal injury or disease acquired in the line of duty during active military service, including aggravation of preexisting conditions during active military service. Eligibility for disability compensation requires both active military service and a disabling condition having a service-connection. See, e.g., 38 C.F.R. § 3.4 (defining compensation as a monthly payment from the Department of Veterans Affairs to a veteran "because of service-connected disability"). Service-connected disability compensation does not require that the veteran be unable to pursue gainful employment in order to receive compensation, quite unlike pre-retirement disability under the Social Security Act. Also, service-connected disability compensation is available for partial disability, 38 U.S.C. § 1114, which is very much unlike the disability benefits provided under either Title II or Title XVI of the Social Security Act or under the Railroad Retirement Act. The mere fact that a veteran might suffer a "total" service-connected disability that would also qualify him or her for social security disability benefits does not supply sufficient cause to view the very different acts or laws as "similar" under the Certificate's offset provision.[7]

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[7] Hannington additionally argues that the offset language cannot be extended to VA benefits because it includes a jurisdictional qualifier: "any other similar act or law provided *in any jurisdiction*." Hannington suggests that this qualifier is meant to refer only to state jurisdictions or other non-federal jurisdictions because federal statutes apply in every state. (Pl.'s Mot. for J. at 4.) A reasonable reading of this qualifying language is that the similar act or law could be one passed in any jurisdiction, state, federal, or foreign. This language reasonably extends to federal laws.

Sun Life argues that "VA disability benefits" under the "VA Benefits Act" are similar to disability benefits under the Social Security Act because they are awarded pursuant to federal law and are made available based on disability.[8] In addition, Sun Life lists the following similarities: that both benefits take the form of periodic payments; that both benefits are paid without regard to fault[9], that death benefits are available under both federal statutes; that the statutes include anti-assignment clauses; that claims under both statutes are administered by independent agencies; and that a single application is used to apply for both social security and VA benefits, citing 38 U.S.C. § 5105. (Def.'s Brief in Opposition to Pl.'s Mot. for J. at 6, Doc. No. 21.) Sun Life adds that the Department of Veterans Affairs recognizes that its rating schedule for service-connected disability is based on a general measure of earning capacity impairment so that, like social security benefits, veterans' benefits are designed to ensure a minimum level of income. (Id. at 6-7, citing 38 C.F.R. §§ 4.1, 4.15, 4.16.) (Def.'s Mot. for J. at 6-7.) These commonalities, however, do not justify a finding that service-connected compensation and social security benefits arise under "similar" acts.

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[8] Sun Life focuses on the Social Security Act without developing an argument concerning the particular characteristics of the Railroad Retirement Act.

[9] This does not appear to be accurate. Service-connected benefits are not available for disability that results from the veteran's willful misconduct or from the abuse of alcohol or drugs. 38 C.F.R. § 3.1(m).

Of the features listed by Sun Life, the closest to the mark is the fact that "disability" is a qualifying factor for both service-connected disability compensation and social security disability benefits. However, the concept of "disability" can be conceived of in different ways and can be measured by many different standards. For instance, the disability concept under the service-connected disability compensation law allows for findings (or "ratings") of partial disability, as low as ten percent. By comparison, the Social Security Act treats disability as an inability to pursue any substantial gainful activity. In effect, the Social Security Act's lowest qualifying measure of disability is significantly more demanding than, for example, a ten percent disability rating for service-connected disability compensation. Additionally, the only disabilities that qualify for compensation under the service-connected disability compensation laws are those acquired in active military service. Service-connected disability compensation is designed to compensate for a special sacrifice and is not conditioned on total disability. That is not true of social security disability benefits.[10]

The other features that Sun Life lists are superficial, at best. The fact that both schemes are federal is not a reasonable basis to conclude that they are similar acts or law. Nor is the fact that provision is made under both schemes for survivor benefits, for anti-assignment, for third-party administrative

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[10] Another noteworthy attribute of service-connected disability compensation (actually all veterans' benefits) is that they may be received by a veteran who also receives disability insurance benefits under the Social Security Act, without any reduction in his social security benefit. 42 U.S.C. § 424a(a)(2)(B)(i).

processing, or for a streamlined application process. These few common threads are woven into larger and distinctly different fabrics. It is the differences that stand out upon comparison, not the similarities. A fiduciary free of a structural conflict of interest would not attempt to emphasize the limited similarities given the more substantial and meaningful differences that are readily apparent, particularly as the Plan Certificate makes no mention of VA benefits at all.

This approach to policy construction is unreasonable, even where, as here, the disabling condition at issue qualifies the veteran for both social security disability benefits and service-connected disability compensation. I emphasize this point only because Hannington's particular scenario is suggestive of a facile similarity insofar as his service-connected disability also qualifies him for disability benefits under Title II of the Social Security Act. Despite this aspect of his particular case, it is easy to imagine a scenario involving a veteran who receives service-connected disability compensation for a preexisting condition different from a later, non-service-connected condition that qualifies him for social security disability benefits but not service-connected disability compensation. Nothing in the Certificate language reasonably suggests that a veteran would be subject to an offset against his LTD insurance because he continued to receive monthly compensation for a preexisting and unrelated, service-connected disability. If anything, the possibility of such a scenario reinforces just how dissimilar service-connected disability compensation law is to the Social Security Act. It is not reasonable for a veteran to lose a monthly benefit for a partial, service-connected disability simply because he

or she later suffers a total non-service-connected disability. Hannington should not be in any worse position just because his service-connected disability happens to be severe enough to allow for disability benefits under the Social Security Act. In either scenario, the fact remains that service-connected disability compensation law is not sufficiently similar to the Social Security Act such that it would reasonably be suggested based on a vague reference to any other act or law "similar to" the Social Security Act.

This conclusion is reinforced, in my view, by the structural conflict of interest that exists in this case. But for this factor, it is difficult to understand why Sun Life would apply an offset for service-connected disability compensation when the Certificate nowhere references service-connected disabilities, much less veterans. A reasonable fiduciary would be troubled by the Certificate's omission of any reference to veterans' benefits or service-connected disability compensation. Any veteran considering whether to participate in a long-term disability plan would want to be apprised of the fact that the policy called for veterans' benefits to be offset against insurance proceeds. This is particularly so in the case of veterans' benefits associated with a service-connected disability, which benefits might already be in place when the veteran is considering whether to purchase LTD insurance. A veteran considering whether to purchase such insurance, as a person presently engaged in the work force, would certainly object to the idea that his or her service-connected disability compensation arises from an act or law "similar to" the Social Security Act, which is limited to individuals unable to engage in substantial gainful employment. Sun Life's structural

bias is a factor that helps to explain its administrative interpretation of the offset provision.

Were it not for the ERISA overlay, it would be most in keeping with insurance law to construe any ambiguity arising from the "other income" offset provision against the insurer, as the Supreme Court of Texas did in Barnett v. Aetna Life Ins. Co., 723 S.W.2d 663, 665-666 (Tex. 1987). Given the ERISA overlay, however, the rule of *contra proferentum* does not apply and I have not based my recommendation on that rule. Even in the context of the arbitrary and capricious standard of review, however, Sun Life"s determination is an unreasonable one.

This case is similar to Riley v. Sun Life & Health Ins. Co., in which the District of Nebraska addressed the identical plan language. That court found that it was reasonable for a plan administrator to conclude that "retirement or disability benefits received through veterans' benefits statutes . . . are 'similar to' retirement or disability benefits received through the Social Security Act . . . and the Railroad Retirement Act," noting, however, that it might rule otherwise "[i]f the plaintiff's VA benefits were based on . . . a service-related disability that was different from the disability that led to his receipt of benefits under the ERISA plan." Case No. 8:09CV303, 2010 U.S. Dist. Lexis 61881, *12-14 & n.3, 2010 WL 2545768 (D. Neb. June 18, 2010). In effect, the court's assessment of the reasonableness issue turned on the fact that the disability that qualified the claimant for LTD benefits was the same as the disability that qualified him for veterans' benefits. While that argument has a facile appeal on the facts of this case, that is not the issue

presented by this policy language. The question is whether the acts or laws are themselves similar and logically coherent for purposes of associating them under the Certificate's fifth definition of other income.

On the day immediately following oral argument in this matter, a panel of the Eighth Circuit reversed the District of Nebraska's decision in Riley. In a majority opinion, the panel observed that the plan language did not contain any provision that would have put the claimant on notice that VA benefits would be offset. According to the Court: VA benefits "for a wartime service-related disability, as a matter of statutory construction, do not derive from an act that is 'similar to' the SSA or RRA." Riley v. Sun Life and Health Ins. Co., ___ F.3d. ___, 2011 U.S. App. Lexis 20393, *8, 2011 WL 4634218, *3 (8th Cir. Oct. 7, 2011) (2-1). The Court pointed out that the SSA and the RRA provide disability benefits derived from a tax on the employer and the employee and provide a form of insurance measured by what has been paid in, whereas VA benefits are in the nature of "compensation for injuries to service men and women during military duty" and are funded in the VA's budget rather than by means of a tax on service members. Id., 2011 U.S. App. Lexis 20393, *9-10, 2011 WL 4634218, *3. The Court also noted that the "road" to benefits is an easier one for veterans under the Veterans Benefits Act than it would be under the SSA or RRA. Id., 2011 U.S. App. Lexis 20393, *10, 2011 WL 4634218, *3. In addition to these significant differences, the Court highlighted case law emphasizing the special solicitude Congress has expressed and demonstrated for veterans, including Henderson v. Shinseki, 131 S. Ct. 1197, 1199 (2011), and United States v. Oregon, 366 U.S. 643, 647 (1961).

In summary, the Court explained: "The differing burdens, funding, and most especially, policy purposes of the VBA versus the SSA and/or the RRA indicate that as a matter of statutory construction, the VBA is in no relevant way similar to the SSA or the RRA." 2011 U.S. App. Lexis 20393, *11-12, 2011 WL 4634218, *4. These reasons are persuasive, in my view, and demonstrate the merit of Hannington's suit.[11]

The other precedents cited and discussed in the parties" memoranda concern readily distinguishable plan language and offer no assistance in the resolution of this matter. See, e.g., Jones v. ReliaStar Life Ins. Co., 615 F.3d 941 (8th Cir 2010) (affirming claims decision that VA benefits fell within "other income" defined to include benefits derived from other sources because of "the same or related disability").

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[11] The panel decision focuses on service-connected disability benefits even though it references the "Veterans' Benefits Act" broadly. The dissenting justice emphasizes that the Veterans' Benefits Act, broadly, includes non-service-connected disability benefits that are like social security benefits because they are "essentially based on employment." 2011 U.S. App. Lexis 20393, *13, 2011 WL 4634218, *4(Colloton, J., dissenting). Despite this observation, I consider the panel's rationale to be entirely persuasive when one considers, specifically, the law or act that provides for "wartime disability compensation," 38 U.S.C. §§ 1110-1118, or the law or act that provides for "peacetime disability compensation," id. §§ 1131-1137. This case does not require the Court to determine whether a non-service-connected VA disability pension, see id. §§ 1521-1525, would be subject to offset on the interpretation advanced by Sun Life, though I note that the only veterans eligible for such pensions are those who served during "a period of war." 38 U.S.C. § 1521.

Conclusion

For the reasons set forth above, I recommend that the Court find that the law or act providing Hannington with service-connected disability compensation is not reasonably similar to either the Social Security Act or the Railroad Retirement Act for purposes of the "other income" offset described in Sun Life's Group Policy Certificate. Should the Court agree with this recommendation, Plaintiff's Motion for Judgment (Doc. No. 18) should be GRANTED and Defendant's Motion for Judgment (Doc. No. 17) DENIED. The Court's Judgment should direct that Sun Life pay past and future benefits without any offset based on Hannington's receipt of service-connected disability benefits.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within fourteen (14) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within fourteen (14) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

October 14, 2011

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 12-1085

[Filed April 23, 2013]

DAVID HANNINGTON,

Plaintiff-Appellee,

v.

SUN LIFE AND HEALTH INSURANCE COMPANY,

Defendant-Appellant.

Before

Lynch, Chief Judge,
Torruella, Ripple,* Boudin,** Lipez,

* Of the U.S. Court of Appeals for the Seventh Circuit, sitting by designation.

** Judge Boudin did not participate in the vote.

Howard, Thompson, Kayatta,[***] Circuit Judges.

ORDER OF COURT

Entered: **April 23, 2013**

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Gisele Muriel Nadeau
Josha Bachrach
Byrne Joseph Decker
John Samuel Koppel
Michael Jay Singer

[***] Judge Kayatta is recused and did not participate in the consideration of this matter.

APPENDIX F

United States Court of Appeals
For the First Circuit

No. 12-1085

[Filed October 15, 2012]

DAVID HANNINGTON,

Plaintiff, Appellee,

v.

SUN LIFE AND HEALTH INSURANCE COMPANY,

Defendant, Appellant.

Before
Lipez, Ripple,* and Howard, Circuit Judges.

ORDER OF COURT

Entered: October 15, 2012

* Of the Seventh Circuit, sitting by designation

Mr. Hannington participated through his employer in a group long term disability policy issued by Sun, then known as GE Group Life Assurance Company ("GE"). The plan's ERISA notice identifies GE as the Claims Fiduciary, and the plan grants it "the sole and exclusive discretion and power to . . . construe any and all issues relating to eligibility for benefits." It also provides that "all findings, decisions, and/or determinations of any type made by the Claims Fiduciary shall not be disturbed unless the Claims Fiduciary has acted in an arbitrary and/or capricious manner."

Under the plan, a disabled beneficiary receives sixty percent of his pre-disability salary. However, the plan reduces this benefit by amounts received as "Other Income benefits," defined in the section entitled "Other Income." This section lists seven categories, including category five which is the subject of this dispute.[*] Category five defines "Other Income" to include "any amount of disability or retirement benefits under: a) the United States Social Security Act . . .; b) the Railroad Retirement Act; c) any other similar act or law provided in any jurisdiction."

In a recommended decision, the magistrate judge reviewed the similarities that Sun had pointed out

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[*] The plan lists seven categories of "Other Income." They are: (1) temporary or permanent awards under various acts; (2) disability benefits under any compulsory benefit act or law; (3) disability or loss of income benefits under various insurance plans; (4) benefits received under an employer retirement plan; (5) the disputed section; (6) income received from any salary continuance plan; (7) benefits under unemployment compensation laws

between the Social Security Act ("SSA") and the Veterans' Benefits Act and concluded that those similarities were superficial. In the magistrate judge's view, "it is the differences [between these Acts] that stand out upon comparison, not the similarities." The district court concurred in all the magistrate judge's conclusions.

As this case comes to us, it involves a challenge to an administrator's interpretation of an ERISA qualified plan where the plan grants the administrator broad discretion to interpret the terms of the plan. Here, in exercising that discretion, the administrator had to determine whether disability and retirement benefits under the Social Security Act, 42 U.S.C. § 301 et seq., and the Railroad Retirement Act, 45 U.S.C. § 201 et seq. can be considered to be similar to disability and retirement benefits under the Veterans' Benefits Act, 38 U.S.C. § 101 et seq.

Our decision in this case well may affect many future recipients of benefit awards under Veterans' Benefits Act, and Congress has entrusted the administration of that statute and, indeed, the other federal statutes relevant to this case, to various departments of the Executive Branch. Accordingly, the court invites the United States to file a brief presenting its view on whether the Veterans' Benefits Act reasonably could be characterized as similar to the Social Security Act or the Railroad Retirement Act such that benefits under the Veterans' Benefits Act could be deemed equivalent to those provided under the other two acts.

Any brief filed in response to this invitation ought to be filed within 45 days of this order. The parties shall have 20 days from the filing of the Government's brief to file simultaneous briefs, not to exceed 20 pages, responding to the position taken by the United States. The court would appreciate the United States informing the Clerk of this court and counsel, within 20 days of this order, as to whether it has decided to accept this invitation to file a brief.

The Clerk shall transmit to the United States a full set of the briefs filed by the parties in this court.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Joshua Bachrach Byrne
Joseph Decker
Gisele Muriel Nadeau
Barbara Biddle.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 12-1085

[Filed December 20, 2012]

DAVID HANNINGTON,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
SUN LIFE AND HEALTH INSURANCE COMPANY,	)
	)
	)
Defendant-Appellant.	)
	)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MAINE

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN RESPONSE TO THE COURT'S INVITATION

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No. 12-1085

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

DAVID HANNINGTON,

Plaintiff-Appellee,

v.

SUN LIFE AND HEALTH INSURANCE COMPANY,

Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN RESPONSE TO THE COURT'S INVITATION

INTRODUCTION AND INTEREST OF THE UNITED STATES

In accordance with Fed. R. App. P. 29 and the Court's Order of October 15, 2012 (Order), inviting the government to submit its views, the United States of America (United States) submits the instant amicus curiae brief.

The Order states in pertinent part that:

> Our decision in this case may well affect many future recipients of benefit awards under [the]

> Veterans' Benefits Act, and Congress has entrusted the administration of that statute and, indeed, the other federal statutes relevant to this case, to various departments of the Executive Branch. Accordingly, the court invites the United States to file a brief presenting its view on whether the Veterans' Benefits Act reasonably could be characterized as similar to the Social Security Act or the Railroad Retirement Act such that benefits under the Veterans Benefits' Act could be deemed equivalent to those provided under the other two acts.

Order 2.

This brief is filed primarily to aid the Court in its deliberations. Although the government does not have a direct interest in this private contract action, it does have an interest in any judicial precedent on the question of whether the veterans' service-connected disability benefits at issue in this case are similar to disability or retirement benefits under the Social Security Act or the Railroad Retirement Act. Accordingly, the United States accepts the Court's invitation to participate as amicus curiae.

STATEMENT OF THE ISSUE

Whether service-connected disability benefits awarded by the Department of Veterans Affairs (VA) under 38 U.S.C. § 1110 are "similar" to "disability or retirement benefits" awarded under the Social Security Act, 42 U.S.C. § 401 *et seq.*, or the Railroad Retirement Act, 45 U.S.C. § 231 *et seq*.

STATEMENT OF FACTS

The facts of this private action are set forth in defendant-appellant's opening brief (at 3-7). Briefly, pursuant to the Employee Retirement Income Security Act (ERISA), 45 U.S.C. § 1001 *et seq.*, plaintiff-appellee David Hannington filed a claim for long-term disability benefits under his employer's ERISA plan. Although the plan fiduciary, Sun Life and Health Insurance Company, approved plaintiff's disability claim, it reduced the amount of ERISA benefits awarded to plaintiff, because it determined that plaintiff's VA service-connected disability benefits constituted "other income" within the meaning of the ERISA plan – *i.e.*, that such benefits are "similar" to "disability or retirement benefits" under the Social Security Act or the Railroad Retirement Act.

Plaintiff then brought this action in district court, challenging the fiduciary's determination. The case was assigned to a magistrate judge, who issued a recommended decision concluding that veterans' disability benefits are not similar to disability or retirement benefits under the Social Security Act or the Railroad Retirement Act; the magistrate judge so concluded after conducting an extensive analysis and comparison of the statutes at issue. *See* Recommended Decision (reproduced in Addendum to defendant's opening brief, at 1-15). The district court thereafter adopted the recommendation, based upon the magistrate judge's reasoning.

The magistrate judge held that "federal service-connected disability compensation law is very much unlike the Social Security Act or the Railroad

Retirement Act, such that it is unreasonable to lump it together with the latter acts based on vague language referencing 'similar' acts or laws." *Id.* at 7. The magistrate judge found support for this view in the following considerations: (1) employment capacity plays a far lesser role in the VA service-connected disability program than it does in the context of the Social Security Act and the Railroad Retirement Act; (2) the types and levels of disability required for compensation are very different; and (3) the respective statutory provisions governing application, survivorship, and non-duplication of benefits also differ markedly. *See id.* at 8-11.

The fiduciary appealed, and the case was briefed and argued in this Court. Oral argument took place on September 13, 2012, and approximately one month later the Court issued an order inviting the United States to express its views on the "similar benefits" question. Order 2.

ARGUMENT

VETERANS' SERVICE-CONNECTED DISABILITY BENEFITS ARE NOT "SIMILAR TO" DISABILITY OR RETIREMENT BENEFITS UNDER THE SOCIAL SECURITY ACT OR THE RAILROAD RETIREMENT ACT.

The magistrate judge's decision, which the district court affirmed, compared various aspects of VA disability compensation to the Social Security Act and the Railroad Retirement Act: the relevance of employment to eligibility for benefits; the types and levels of disabilities required for compensation; and the

respective statutory provisions governing application, survivorship, and non-duplication of benefits. A brief discussion of each of these aspects follows, including elaboration of some factors that the magistrate judge's decision did not explicitly consider.

As an initial matter, although the magistrate judge's opinion addressed only VA service-connected disability compensation, this Court's order refers more broadly to "benefits under the Veterans' Benefits Act." Order 2. Because there is no unitary "Veterans Benefits Act," the Order could be construed to refer to the wide array of monetary benefits VA provides under Title 38 of the United States Code, which include disability compensation, disability pension, education benefits, housing benefits, and other special-purpose benefits. We believe, however, that the issue presented in this case should properly be limited to VA disability compensation, as that is the benefit the ERISA plan administrator seeks to offset in the matter giving rise to this litigation. Nonetheless, an understanding of other VA benefits, most notably disability pension, may be helpful in analyzing that issue.

A. Relevance of Employment.

The magistrate judge stated that VA service-connected disability compensation "does not require that the veteran be unable to pursue gainful employment in order to receive compensation, quite unlike pre-retirement disability under the Social

Security Act."[1] Recommended Decision 8. In general, this is correct, although substantially gainful employment may bar a veteran from receiving higher levels of compensation based on unemployability, such as total disability due to individual unemployability (TDIU) or a 100% rating for a mental disorder. *See* 38 C.F.R. §§ 4.15, 4.16, 4.126, and 4.130. In general, the rating schedule consists of percentage ratings that "represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations." 38 C.F.R. § 4.1; *see* 38 U.S.C. § 1155. The majority of disability ratings therefore do not reflect the particular circumstances of a veteran's employment.

Rather, application of a particular disability rating requires "[f]indings sufficiently characteristic to identify the disease and the disability therefrom, and above all, coordination of rating with impairment of function." 38 C.F.R. § 4.21. Further, severely disabled veterans who qualify for disability compensation may receive additional amounts, known as "special monthly compensation," based on such factors as the need for the regular aid and attendance of another or the veteran's housebound or bedridden status. *See* 38 U.S.C. § 1114(k)-(s). These specific-purpose payments for service-connected disability clearly are not intended as mere replacement for lost wages. Furthermore, certain other VA payments for service-connected

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[1] This feature of VA disability compensation is also "quite unlike pre-retirement disability" under the Railroad Retirement Act. *See* 45 U.S.C. § 231a(a)(2).

disability are similarly targeted to specific purposes. *See, e.g.*, 38 U.S.C. § 1162 (annual clothing allowance for veterans whose service-connected disabilities require the use of a prosthetic or orthopedic appliance or medication that tends to damage the clothing).

Although the magistrate judge's ruling focused primarily on service-connected disability compensation, VA also provides disability pensions for veterans of wartime service, or their surviving spouses or children. *See* 38 U.S.C. §§ 1521, 1541, 1542. In contrast to disability compensation, which is paid only for disability due to a veteran's service, disability pension is payable to wartime veterans disabled by conditions unrelated to their service. *See* 38 U.S.C. § 1521(a). Pension eligibility is generally premised upon permanent and total disability, which may be established in several ways, including: (1) a determination by the Commissioner of Social Security that the veteran is disabled; (2) a showing that the veteran is "[u]nemployable as a result of a disability reasonably certain to continue throughout the life of the person"; or (3) "any disability which is sufficient to render it impossible for the average person to follow a substantially gainful occupation, but only if it is reasonably certain that such disability will continue throughout the life of the person." 38 U.S.C. § 1502(a). Therefore, although a veteran may become eligible for VA pension benefits by being actually unemployable, he or she may also become eligible through a disability which renders it impossible for an *average* person to remain employed, regardless of the veteran's individual employment status. Additionally, veterans aged 65 and older who are otherwise eligible for pension benefits are not required to be permanently and totally

disabled. *See* 38 U.S.C. § 1513. In view of the foregoing factors, a VA disability pension bears more similarity to benefits under the Social Security Act and Railroad Retirement Act than does VA disability compensation.

In certain respects, however, a VA disability pension also may differ from Social Security Act and Railroad Retirement Act benefits. The amount of VA pension benefits payable is reduced based on income and is subject to net-worth limitations. *See* 38 U.S.C. §§ 1503, 1521, 1522. In this respect, a VA disability pension is a need-based benefit.[2] Additionally, in a manner similar to the special monthly compensation benefits discussed above, severely disabled veterans may receive heightened payments of "special monthly pension" based upon special factors, such as the need for regular aid and attendance of another or the veteran's housebound status. *See* 38 U.S.C. § 1521(d)-(f).

B. Degree of Disability Required.

The magistrate judge further noted that "service-connected disability compensation is available for partial disability, . . . which is very much unlike the disability benefits provided under either Title II or Title XVI of the Social Security Act or under the

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[2] We note that the Supplemental Security Income (SSI) program under Title XVI of the Social Security Act is also considered a need-based program. *See* 42 U.S.C. § 1381a (indicating that the person must be eligible on the basis of his income and resources); *Bowen v. Yuckert*, 482 US 137, 140 (1987) (observing that Title XVI of the Act provides for the payment of disability benefits to indigent persons under the SSI program).

Railroad Retirement Act." Recommended Decision 8. This is correct with respect to VA disability compensation. VA is authorized to pay disability compensation for increments of disability ranging from 10% to 100%. *See* 38 U.S.C. §§ 1114, 1155. VA pension benefits do not involve a scaled disability rating system. However, as explained above, there are various ways to establish "permanent and total disability" for purposes of VA pension benefits, and veterans aged 65 and over are exempt from that criterion for eligibility.

C. Additional Factors.

The magistrate judge also considered "the fact that provision is made under both schemes [*i.e.*, social security disability benefits and VA disability compensation] for survivor benefits, for anti-assignment, for third-party administrative processing, or for a streamlined application process," and concluded that "[t]hese few common threads are woven into larger and distinctly different fabrics." Recommended Decision 10. The operation of the statutory schemes governing VA benefits and Social Security or Railroad Retirement benefits, respectively, supports this conclusion. For example, while Congress has prohibited "duplication of benefits" in certain cases when VA compensation overlaps with other payments such as military retirement pay, it has not prohibited receipt of Social Security Act or Railroad Retirement Act benefits concurrent with VA compensation. *See* 38 U.S.C. § 5304. Similarly, receipt of veterans' benefits will not result in a corresponding reduction in social

security benefits under Title II of the Social Security Act.[3] *See* 42 U.S.C. § 424a(a)(2)(B)(i).

In *Hodge v. West*., 155 F.3d 1356 (Fed. Cir. 1998), the Federal Circuit held that the standard used by SSA to determine the materiality of new evidence was "inconsistent with the general character of the underlying statutory scheme for awarding veterans' benefits." *Id.* at 1362. The court further observed:

> This court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant. It is our understanding that the system through which social security benefits are awarded – and the scheme from which the Court of Veterans Appeals borrowed the test it adopted in *Colvin* – is not similarly designed. The underlying systems being inconsistent in purpose and procedure, it seems inappropriate to adopt wholesale the test for materiality from one benefits scheme for application in the other.

Hodge, 155 F.3d at 1362 (citations omitted).

Finally, the magistrate judge's observation that VA service-connected disability compensation, unlike benefits under the Social Security Act or the Railroad

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[3] By contrast, the Title XVI SSI program is a need-based program of last resort, and all income not excluded by statute or regulation is countable income. *See* 8 n.2, *supra*. Veterans' disability benefits are not an excluded source of income and receipt of them may make a person ineligible for SSI or reduce the SSI payment.

Retirement Act, "is designed to compensate for a special sacrifice and is not conditioned on total disability" (Recommended Decision 10), bears emphasis. Indeed, this key distinction establishes the fundamental dissimilarity between the VA benefits plaintiff receives and the other federal benefits specified as comparators in the ERISA plan. Thus, in our view the Eighth Circuit's recent decision in *Riley v. Sun Life and Health Ins. Co.*, 657 F.3d 739 (8th Cir. 2011), correctly resolves the question that the Court has invited the United States to address here. *Riley* adjudicated the identical question – *i.e.*, the effect of VA service-connected disability benefits on an ERISA plan containing the same language at issue here, and administered by the same fiduciary – and ruled that such benefits were not "similar" to the disability or retirement benefits provided under the Social Security Act or the Railroad Retirement Act, for essentially the same reasons invoked by the magistrate judge in the case at bar.[4] *See id.* at 742-43.

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[4] In rejecting the majority's holding in *Riley*, the dissent in that case relied heavily upon the deferential standard of review. *See id.* at 743-45. In keeping with the limited question posed to the government by the Court's Order, we do not take a position as to the correct outcome in this case when that standard is applied; rather, we confine our submission to a discussion of the pertinent similarities and differences between the VA service-connected disability benefits statute, the Social Security Act, and the Railroad Retirement Act.

We caution, however, that while the deferential standard of review of an ERISA administrator's decision, where the administrator is assigned discretionary authority to construe and apply plan terms, is often described as "arbitrary and capricious" review, *see, e.g., Wright v. R.R. Donnelley & Sons Co. Group*

CONCLUSION

For the foregoing reasons, service-connected VA disability benefits are not similar to disability or retirement benefits under the Social Security Act or the Railroad Retirement Act.

Benefits Plan, 402 F.3d 67, 73-74 & n.3 (1st Cir. 2005), that phrase could be erroneously read to suggest that the Court should borrow standards under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), including "substantial evidence" review. Such an approach would be too deferential; the right standard, drawn from trust law, is one of reasonableness. ERISA's statutory cause of action to recover benefits under a plan does not incorporate APA standards governing judicial review of government action, but instead looks to the distinct body of private trust law, which imposes special fiduciary duties and assigns reviewing responsibilities to courts under a more general standard of reasonableness that is particularly sensitive to the existence of financial conflicts of interest. *See Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 110-119 (2008); *Wright*, 402 F.3d at 74.

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[Certificate of Compliance Omitted for Purposes of this Appendix]

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